



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 30, 2023

IN THE MATTER OF:

Appeal Board No. 626272

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding, effective July 4, 2022, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(11). The claimant requested a hearing. The Commissioner of Labor objected that the hearing request was not made within the time allowed by statute.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed October 3, 2022 (), the Administrative Law Judge overruled the Commissioner of Labor's timeliness objection and overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted by the claimant and on behalf of the employer.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made insofar as they concern the issue of the timeliness of the claimant's hearing request. The findings of fact and the opinion of the Administrative Law Judge, insofar as they concern the issue of the timeliness of the claimant's hearing request,

are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board.

As to the issue of reasonable assurance, based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant, a union member, worked for the employer as a full-time school aide beginning on April 29, 2019. Full-time positions are usually governed by a union contract and full-time employees usually report to the same school each year they work. The claimant worked as a school aide in the 2021-2022 school year; she worked on five hours per day for five days per week and earned \$16.52 per hour. In June 2022, the employer sent the claimant an email advising her that her hours would be reduced to four hours per day for the 2022-2023 school year. The rate of pay for someone in the claimant's position would usually rise from year to year pursuant to the union contract. However, the claimant's rate of pay for the 2022-2023 school year remained the same as the previous school year at \$16.52 per hour. The claimant was also paid over the summer between the end of the 2021-2022 school year and the beginning of the 2022-2023 school year. Her compensation for the summer is at a reduced rate determined pursuant to a formula set by the employer.

The employer's witness was a human resources assistant. The witness provided no testimony as to his qualifications or job duties. He did not know the details of the alleged contract governing the claimant's employment, including the terms of the contract with respect to the claimant's employment or the timeframe covered by an existing contract, and did not produce a copy of a union contract. The employer did not produce the payroll report to show what the claimant earned in the 2021-2022 school year or provide testimony as to what the claimant could expect to earn in the 2022-2023 school year, including whether she would again be paid any additional salary for the summer after the 2022-2023 school year and whether such compensation was in the same capacity of full-time school aide and also governed by a union contract.

OPINION: Pursuant to Labor Law § 590 (11), the wages paid to a claimant who worked for an educational institution in other than an instructional, research or principal administrative capacity cannot be used to establish a valid original claim or a benefit rate, during a period between academic years or terms or during an established and customary vacation period or holiday recess, if the claimant has reasonable assurance of performing similar

services in the next academic year or term, or during an established and customary vacation period or holiday recess for the period immediately following such vacation period or holiday recess. An employer must demonstrate with competent testimony from knowledgeable witnesses concerning the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied, there is no reasonable assurance of employment. (See Appeal Board Nos. 552093 and 551885).

Reasonable assurance may exist by virtue of a contract of employment for services. However, the employer must, nevertheless, produce competent testimony from knowledgeable witnesses concerning the contract and its terms in order to establish an offer of reasonable assurance. The credible evidence fails to establish that the claimant was provided with reasonable assurance for her position as full-time school aide for the 2022-2023 school year. In so concluding, we note that the employer has not established that the human resources assistant was a competent witness to testify as to the offer of reasonable assurance by virtue of the union contract as they contend. There was no testimony as to the assistant's training and experience, job duties, or the source of his knowledge of the offer of reasonable assurance. On the contrary, the employer's witness readily conceded that he was not aware of the terms of the union contract and did not produce a copy of the contract. As the witness did not provide testimony as to the terms and conditions of the claimant's employment from year to year, the terms governing her position in the union contract or the years which any current contract covers, the record fails to establish that a contract did, in fact, cover the claimant's employment in both the 2021-2022 school year and in the 2022-2023 school year. In fact, the witness's testimony that the hourly pay of contractual employees usually rose from year to year but that there was no change in the rate of the claimant's pay in the relevant school years as well as his concession that the claimant's hours would be reduced by 20 percent in the 2022-2023 school year tends to suggest that her employment was not pursuant to a union contract in place for both school years. As such, there was no evidence that the claimant was assured of continued employment at substantially the same terms as the prior year. Lacking a sufficient competent basis to support the conclusion that there was reasonable assurance of employment, we find that the exclusionary provisions of Labor Law § 590 (11) do not apply to the claimant.

DECISION: The decision of the Administrative Law Judge is affirmed.

The Commissioner of Labor's timeliness objection is overruled.

The initial determination, holding, effective July 4, 2022, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (11), is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER